BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH B. NAVRAT-KARZON	)	
Claimant	)	
VS.	)	
	)	Docket No. 248,631
WYNDHAM GARDEN HOTEL OF WICHITA	)	
Respondent	)	
AND	)	
	)	
AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ELIZABETH B. NAVRAT-KARZON	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,007
PACIFIC LINEN, INC.	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent Wyndham Garden Hotel of Wichita (Wyndham) and its insurance carrier appealed the January 27, 2000 Order entered by Administrative Law Judge Jon L. Frobish. At claimant's request, these two claims were consolidated for hearing by the ALJ.

ISSUES

On February 18, 1997, while working for respondent Pacific Linen, Inc., claimant sustained an injury to her right knee while moving a bed. She was treated by Dr. Thomas W. Kneidel, who performed surgery on April 17, 1997. Thereafter, claimant did not return to her job with Pacific Linen but continued to work for Clubhouse Inn, now Wyndham. While there claimant suffered additional repetitive trauma injuries to her left foot. Wyndham contends these aggravations were due to her altered gait and from trying to

protect her right knee. Docket No. 222,007 is the claim for injury to the right knee and also the left foot as a direct and natural consequence of the right knee injury.

In Docket No. 222,007, claimant is dissatisfied with Dr. Kneidel's treatment and seeks a change in the authorized treating physician for the right knee injury. The ALJ ordered respondent Pacific Linen to provide claimant with the names of three physicians from which to choose a new treating physician for the knee injury in Docket No. 222,007. That order was not appealed.

Docket No. 248,631 is a claim for a series of injuries/aggravations to claimant's left foot beginning January 1, 1998, and each and every working day thereafter. Accordingly, claimant seeks authorized medical treatment for the left foot injury under either Docket No. 222,007 or 248,631. As stated, these two claims were consolidated for hearing purposes.

Judge Frobish found that claimant's additional injuries were the result of a new series of accidents and that claimant was therefore entitled to preliminary benefits for the left foot injury in Docket No. 248,631 rather than in Docket No. 222,007. Dr. Larry K. McNeil was named as the authorized treating physician in Docket No. 248,631.

Wyndham, claimant's subsequent employer, argues the Judge erred in finding a new series of accidents because the record proves that she sustained injury to her left foot as a natural and probable consequence of the injury to her right knee. Therefore, Wyndham contends Judge Frobish erred by finding that claimant sustained a new series of accidents to the foot from and after January 1, 1998 as a result of her employment with Clubhouse Inn and Wyndham, and by awarding claimant preliminary benefits for the foot injury in Docket No. 248,631.

The claimant suggests this foot problem is a natural consequence of the knee injury but concedes the work at Wyndham has been a contributing factor. Absent her work there that requires she be on her feet most of the day, the foot problem most likely would not have developed, or not been as severe. Claimant's prior employer, Pacific Linen, asks that the ALJ's award against Wyndham be affirmed.

The issue before the Appeals Board on this appeal is whether claimant's left foot injury arose out of her employment with Pacific Linen or Wyndham.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board agrees with and affirms the ALJ's preliminary hearing Order.

Findings of Fact

Claimant is presently employed at the Wyndham Garden Hotel as the cafe manager. She works full time, between 40 and 45 hours per week. She has been the manager since January of 1999. Before that she was the evening shift supervisor for about a year. During that period she worked between 30 and 35 hours per week. Before that she was a bartender.

Wyndham is the successor to the Clubhouse Inn. Wyndham purchased Clubhouse in August 1997. At that time claimant was a part-time bartender for Clubhouse Inn and continued working in that capacity for Wyndham before being promoted to supervisor in January of 1998.

While claimant was working for Clubhouse Inn as a part-time bartender, she was also working for Pacific Linen. Claimant started working for Pacific Linen in November of 1996 in the area of floor sales. Pacific Linen sold linen products such as sheets and towels. She worked between 30 and 35 hours per week for Pacific Linen. In the course of that work claimant injured her right knee moving a bed on February 18, 1997.

On April 17, 1997, orthopedic surgeon Thomas W. Kneidel, M.D., performed arthroscopic surgery on the knee. Claimant said she was initially given restrictions of no walking, climbing ladders, bending or lifting but she was released with no restrictions May 29, 1997. Claimant continued in physical therapy until February 1998 when Dr. Kneidel discontinued treatment. Claimant felt Dr. Kneidel was not giving appropriate consideration to her ongoing pain complaints. Claimant testified she continues to have symptoms in her knee. She favors the knee and, as a result, has an altered gait. Claimant described this as "I walk funny". Claimant testified that she leans to her left when she walks and has noticed that the left foot of her shoes wears out faster. Her knee occasionally gives out or buckles. On one occasion she fell down a flight of stairs breaking a couple of toes. The fall occurred in late May or early June 1999. She did not seek medical treatment for that injury.

When claimant was released by Dr. Kneidel, Pacific Linen was no longer in business. Claimant did, however, return to her employment with Clubhouse Inn about 4 or 5 days after her surgery. She continued working as a part-time bartender for Clubhouse Inn but with some accommodations, such as help with heavy lifting and being provided with a chair where she could sit and relax when in pain. When she became a supervisor her job duties changed. Her job involved more walking, carrying trays, dishes and delivering room service.

Her job duties increased again when she became manager. This was in part because she would have to fill in for any absent workers. Her duties waiting tables, lifting dishes, cleaning, taking trays to rooms and setting up the cafe increased. Along with these increased duties came increased symptoms in her right knee and left foot.

She first began noticing pain in her left foot after she got off work and would start to relax. Thereafter the pain kept getting worse until she reached the point where she began using crutches. Claimant first sought medical treatment for her left foot on June 25, 1999, with Dr. Douglas L. Young at the Wichita Clinic. She told Dr. Young that her foot pain was particularly bad in the morning when she first walks on it. He took x-rays and diagnosed a plantar fasciitis, or a bone spur, on the bottom of her heel. He showed her some stretching exercises she could do and indicated that she needed to try to distribute her weight evenly by placing more weight on the left rather than favoring the right lower extremity. He recommended she see a podiatrist.

On August 25, 1999 claimant saw Dr. McNeil. He placed lifts in her shoes to relieve the pressure on her heel which has helped. Claimant denies having any left foot problems before the knee injury.

Claimant is somewhat confused about when her foot symptoms began. She told Dr. Young in June 1999 that she has had left foot pain for 2 or 3 months. She also testified that those symptoms began in about January or February of 1998 but didn't become severe until about March or April of 1999. By June 1999 claimant said the pain was "really bad" and "extreme". The January 29, 1998 report by Anthony G. A. Pollock, M.D., reflects that claimant was having complaints of heel pain at that time.

Conclusions of Law

An ALJ's preliminary award under K.S.A. 1999 Supp. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.[1] "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."[2] Whether claimant's foot injury is a direct and natural consequence of her original knee injury or whether, instead, claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of her employment with Pacific Linen or her subsequent work for Wyndham. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that

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[1] K.S.A. 1999 Supp. 44-551(b)(2)(A).

[2] K.S.A. 1999 Supp. 44-534a(a)(2).

right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

In general, the Kansas Workers Compensation Act requires employers to compensate employees for personal injuries or aggravations of preexisting injuries incurred through accidents arising out of and in the course of employment.[6] The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[7] The question of whether an aggravation of a preexisting condition is compensable under workers compensation turns on whether claimant's work activity aggravated, accelerated or intensified the disease or affliction.[8]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[9] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[10] Based upon the current record, the Appeals Board finds that claimant's work at Wyndham following her employment with Pacific Linen was an intervening cause of claimant's foot injury such that the altered gait, though a factor in claimant's foot condition, cannot be said to be the direct cause. Absent the work at Wyndham which required claimant to be on her feet most of the day, the heel problem most likely would not have developed or been as severe. Claimant's left foot condition, therefore,

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[3] K.S.A. 1999 Supp. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 1999 Supp. 44-508(g). *See also In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 1999 Supp. 44-501(g).

[6] K.S.A. 1999 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

[7] Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[8] Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 959 P.2d 469, *rev. denied* ___ Kan. ___ (1998).

[9] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[10] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

is not compensable as a direct and natural consequence of the original February 18, 1997 right knee injury. Accordingly, respondent Wyndham is liable for claimant's medical treatment for the left foot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated January 27, 2000 entered by Administrative Law Judge Jon L. Frobish should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: E. L. Lee Kinch, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Kim R. Martens, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director